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No. 79-1225

In the Supreme Court of the United States

OCTOBER TERM, 1979

FIDELITY UNION LIFE INSURANCE COMPANY,
Petitioner,

v.

SYLVIA PERRY, Individually and on Behalf of All Other Similar Situated,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Is an insurance company which extends credit by taking promissory notes from college students in lieu of payments for the first year's premiums on life insurance policies exempted from making Federal Truth-In-Lending disclosures in connection with such loans by application of the McCarran-Ferguson Act merely because the state approves such forms in connection with the sale of the insurance?

STATEMENT

Respondent Sylvia Perry was a college student in Birmingham, Alabama, when a salesman from Fidelity Union Life Insurance Company sold her a life insurance policy on June 24, 1974. Annual premiums on the policy were set at $295.58. To obtain the policy she paid $10.00 down and gave Fidelity Union a promissory note for the remainder of the first premium. The note was payable five years later or upon breach of payment of the premiums, at a disclosed annual percentage rate of 8%. Finance charges are stated as $134.03 on the note. Petitioner furnished Ms. Perry a credit disclosure statement superficially complying with the Federal Truth-In-Lending Act in connection with the transaction. The policy was issued and the note was transferred to the First National Bank in Dallas, Texas. The sale was similar to others routinely made in the State by Fidelity Union's agents.

Ms. Perry became unable to pay the second annual premium when due or make payment on the note. On June 24, 1975, she filed this action in District Court on behalf of all others similar situated alleging that the disclosures furnished by Defendant in connection with the above transaction violated the Truth-In-Lending Act 15 U.S.C. §1601 *et seq*., and Regulation Z, 12 C.F.R. Part 226, in several respects, in addition to violating state law. (Petition, at pp. 28a-29a.)

Fidelity Union raised the McCarran-Ferguson Act, 15 U.S.C. §1012 (b), as a defense in a motion for summary judgment with supporting affidavits and exhibits. The insurance company argues the Truth-In-Lending Act is precluded by the McCarran Act due to Alabama's review of all insurance company forms for purposes of regulating the business of insurance. Alabama's regulation of insurance stems from the Insurance Trade Practices

Law, §27-14-1, *et. seq., Code of Alabama* 1975, Alabama has promulgated regulations concerning the filing of life insurance forms, and guidelines to be followed by companies offering life insurance plans to college students under a premium financing arrangements which include the filing of all sales materials, notes, and other forms. (Petition, Appendix C). This is the extent of the regulation of credit disclosures. No state law requires any particular credit disclosures.

Interestingly, Fidelity Union included with its affidavit in support of summary judgement copies of its correspondence in 1972 with the Federal Trade Commission, the federal agency charged with enforcement of the Truth-In-Lending Act, which indicates that the transaction and disclosure form involved in the instant case is subject to the Truth-In-Lending requirements. The company complied with the FTC's compliance measures at that time. However, Fidelity Union maintains that it subsequently submitted a copy of a substantially similar credit disclosure form to Alabama's Department of Insurance and that the company was approved to use the form in the State. It argues that as a result, the Truth-In-Lending Act would therefore invalidate, impair, or supercede a law enacted by the State for the purpose of regulating the business of insurance.

At the pretrial conference, the parties agreed to initially submit the case to the Court on the sole issue of the applicability of the McCarran Act defense. Summary Judgement was granted for the Defendant by the Order with an attached twenty-page memorandum dated January 26, 1976. (Petition, Appendix A.)

The Court of Appeals reversed in its opinion dated January 2, 1979, with Chief Judge Brown dissenting. (Petition, Appendix C.)

REASONS FOR DENYING THE PETITION

I. IT IS NOT NECESSARY TO GRANT THE PETITION IN ORDER TO RESOLVE A POSSIBLE CONFLICT IN DECISIONS OF THE COURTS OF APPEALS AS TO THE SCOPE OF THE "BUSINESS OF INSURANCE" EXEMPTION.

Fidelity Union argues that certeriori should be granted in order to resolve a conflict in decisions which seems to exist between *Cochran v. Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979), a case decided the same day as the instant case, which the opinion below relies upon, and *Lowe v. Aarco-American, Inc.*, 536 F.2d 1160 (7th Cir. 1976), which the Fifth Circuit expressly rejected. This Court was not asked to grant review in either of those decisions. It is worthwhile to note that both of those decisions involved insurance premium financing companies which were regulated by comprehensive, but different, state laws enacted exclusively for such purpose.[1]

The factual situation in Perry is quite different. Alabama has no specific laws, regulations, or guidelines whatsoever which require any particular credit disclosures of any type in connection with its regulation of selling policies to students. In the instant case, Fidelity Union takes an interest-bearing promissory note from the student in lieu of a cash payment for the major part of the first year's premiums, which is then transferred directly into the hands of a bank, a third-party obviously not subject to the state's regulation of insurance activities, and clearly outside of the scope of the

[1]There was no inconsistency between Illinois's credit disclosure requirements and Truth-In-Lending, while the Georgia statute required disclosures of only some Truth-In-Lending terms, but allowed other such terms to be disclosed. *Cochran v. Paco*, 606 F.2d, at 461, 466.

"business of insurance". Clearly, here Fidelity Union is essentially acting as a conduit for extensions of credit, the same as other creditors and arrangers of credit.

In any event, review is not warranted since this Court has already only last term re-examined the scope of the exemption under the McCarran-Ferguson Act in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), affirming the ruling of the Fifth Circuit in an opinion which is entirely consistent with the Fifth Circuit's decisions in *Perry* and *Cochran.* Fidelity Union's position would require this Court to expand the exemption to include business activities of insurance companies which are not peculiar to the business of insurance, so that it would include not only the "advertising and sale of insurance" policies but also include virtually any type of dealing between an insurance company and its customers to enhance the sale of insurance.

The opinion in *Royal Drug* recognized the fallacity of confusing the obligations under the insurance contract and arrangements made for the carrying out of such obligations:

> By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost savings arrangements may well be sound business practice, and may will inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance". 440 U.S., at 213, 214.

This Court also noted:

> It is true that some type of provider agreement is necessary for a service benefit plan to exist. But it does not follow that because an agreement is necessary to provide insurance, it is also the "business of Insurance". Assume, for example, that an indemnity insurer must have a line of credit or other commercial arrangement with a bank in order to pay off monetary claims. Despite the fact that the line of credit is "necessary" for the insurer to fulfill its obligation, it is nevertheless not the "business of insurance". Id., at 213, 214.

By the same token, it is equally true that even if it is necessary in some cases for the insured to make some sort of credit arrangements to pay the cost of the premium, such credit obligations do not affect the spreading and underwriting of risks, indispensable characteristics of insurance as established in *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959). The policyholder gets the same insurance whether he pays cash, gives a promissory note, or obtains credit through another source. Although it may be a good business practice for the Petitioner to also offer terms of credit to pay the premium, it is in that role engaged in a different activity than the "business of insurance". The exemption is for the "business of insurance", not the "business of insurance companies". *Royal Drug Co.*, 440 U.S., at 211.

> "The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business of insurance*'. Insurance companies do many things which are subject to paramount federal regulations, only when they are engaged in the *'business of insurance'* does the statute apply." *SEC v. National Securities, Inc.*,

> 393 U.S. 453, 459-460 (Emphasis supplied).

In *National Securities*, Justice Marshall aptly observed that the House Report which accompanied the McCarran-Ferguson Act demonstrated Congress's intent only to return matters to the status quo before *United States v. Southeastern Underwriter's Assn.*, 322 U.S. 533 (1944).

> It is not the intention of Congress in the enactment of this legislation to cloth the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case . . .
>
> H.R. Rep. No. 143, 1945 Code Cong. Serv. at 671; see *SEC v. National Securities, Inc.*, 393 U.S. 453, 459.

Certainly, Congress had the power under the Commerce Clause to regulate the disclosure aspect of the terms of credit in Perry's case before the *Southeastern Underwriters* decision was handed down, which declared for the first time that the insurance of business was "commerce".[2] To hold that the McCarran-Ferguson exemption takes away Congress' power to regulate credit disclosures because an insurance company is involved in the extension of credit would be clearly contrary to Congress' intent, and would destroy the status quo which existed prior to *Southeastern Underwriters*.

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[2]The Truth-In-Lending Act was clearly enacted under the Commerce Clause. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973).

Fidelity Union cites the anti-trust case of *Dexter v. Equitable Life Assurance Society of the U.S.*, 527 F.2d 233 (2nd Cir. 1975), to support its contention that methods of inducing persons to become policyholders necessarily fall within the business of insurance. In *Dexter*, as a condition to granting mortgage loans, the borrower was required to purchase life insurance from the insurance company. However, the Court of Appeals did not find in *Dexter* that the lending of mortgage money by insurance companies was within the business of insurance:

> Even if we agreed with plaintiff that the lending of mortgage money by an insurance company does not in itself constitute the "business of insurance", and so is subject to the antitrust laws, a question we need not decide here, the very basis of the Dexter's complaint is that Equitable used the mortgage loan to coerce an insurance policy. Forcing people to buy insurance may well be an undesirable practice . . . but it is part of the "business of insurance". 527 F.2d, at 235.

The key point is that the cause of action in *Dexter* was not aimed directly at the credit transaction. By no means does *Dexter* hold that an insurance company's lending activities are immune to Federal Truth-In-Lending disclosure requirements merely because the mortgage loan happens to be the inducement for the purchase of insurance.

Fidelity Union also cites *Addrisi v. Equitable Life Assurance Society of the U.S.*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), A similar case of an insurance company making loans to individuals for the purpose of financing residential property offering lower interest rates to prospective policyholders. A tie-in arrangement was created where the loan agent also

requires the borrower to purchase the type of insurance at a higher cost to the individual and with higher commissions to the loan agent. Like *Dexter*, the *Addrisi* case involved a direct challenge to the state's regulation of the insurance contract itself because of the inducement therefor, not a challenge to the adequacy of any aspect of the credit disclosure. The Plaintiff there claimed that he was overcharged $864.00 on the life insurance policy. Therefore, Fidelity Union's argument that *Dexter* and *Addrisi* stand for the proposition that the credit disclosures in the loan transactions involved therein were within the business of insurance is without merit for purposes of this case.

II. ASIDE FROM THE FACT THAT FIDELITY'S PREMIUM FINANCING ACTIVITIES DO NOT CONSTITUTE THE "BUSINESS OF INSURANCE", THE EXEMPTION WOULD ALSO NOT APPLY IN THIS CASE BECAUSE THE TRUTH-IN-LENDING CLAIM DOES NOT "INVALIDATE, IMPAIR, OR SUPERCEDE" STATE LAWS WITHIN THE MEANING OF THE ACT.

In *National Securities, supra*, the Court had to determine whether or not disclosures to shareholders in a merger of two insurance companies was subject to federal law protecting shareholders despite the fact that the State of Arizona had regulated and approved the merger considering the merger's effect on both shareholders and policyholders. The insurance company contended that the merger approved by state insurance officials would be "invalidated, impaired, or superceded" by the SEC's interference. Despite the fact that the remedy to the shareholders for the violations of federal law required setting aside the merger approved by the state, the Supreme Court refused to find that state law would be invalidated, impaired, or superceded, even though:

> Arizona approved the merger not only under its laws relating to insurance securities but also in its capacity as a licensor of insurance within the states. The applicable statute requires the State Director of Insurance to find that the proposed merger would not "substantially reduce the security of and service to be rendered to policyholder" before he gives his approval . . . This section of statute clearly relates to insurance. The question is then whether the McCarran-Ferguson Act bars a federal remedy which affects a matter subject to state insurance regulation. In the circumstances of this particular case, we do not think it does; Id. at 462.

Any impairment was a most indirect one:

> Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so . . . In these circumstances we simply do not see the conflict. Id. at 463.

Alabama has permitted, not ordered, Fidelity Union to use its credit disclosure form in connection with loaning money to finance life insurance policies. *National Securities* concluded that the "gravamen of the complaint was misrepresentation, not merger." Id., at 462. Both the state and federal law affected the merger, but not the same conduct or matter. Here, Perry's Truth-In-Lending claim is directed purely at the credit disclosures. As in *National Securities*, no incompatibility exists between the State reviewing the forms in protecting the policyholders with regard to the sale of insurance and the paramount federal interest in providing borrowers with sufficient information to allow

them to compare the terms of credit on the loan.[3]

Under the particular facts of Perry's case, there is no showing of any actual conflict with any state law if Fidelity complies with the federal Truth-In-Lending Act. Neither is there any greater burden placed upon Fidelity because of its credit activities than upon any other creditor or arranger of credit which is required to provide meaningful credit disclosures. The decision of the Court of Appeals allows full accomodation of both the state and federal interests involved. Since there is an absence in this case of any actual conflicting interests in making credit disclosures, review need not be granted by this Court merely because the Petitioner wishes to avoid the prospects of possible liability under Truth-In-Lending.

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Certiorari should be denied.

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[3]The purpose of the Consumer Protection Act (Truth-In-Lending) is set forth in Section 162 of the Act, 15 U.S.C. §1601: "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed use of credit . . ." The Truth-In-Lending Act does not in any way whatsoever affect either the promissory note or the underlying contract of insurance. 15 U.S.C. §1610.

Respectfully submitted,

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